Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1980

* * *

ROBERT O. POLLEY,

Petitioner,

V.

WILBURN E. KIRKLAND, Et. al.,

Respondents,

* * *

BRIEF FOR THE RESPONDENTS, M.L. BROCKETTE AND THE STATE BOARD OF EDUCATION OF THE STATE OF TEXAS, IN OPPOSITION TO THE APPLICATION FOR WRIT OF CERTIORARI OF PETITIONER ROBERT O. POLLEY

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* * *

This is the brief filed on behalf of the Respondents, M.L. Brockette and The State Board of Education of the State of Texas, said brief being in opposition to the Application for Writ of Certiorari of Petitioner, Robert O. Polley.

OPINION

The Memorandum Opinion of the United States District Court, Western District of Texas, Austin Division and the local Rule 21 decision of the United States Court of Appeals for the Fifth Circuit, appear in the Appendix of Petitioner's Application for Writ of Certiorari, pages A1-A22.

JURISDICTION

Respondents have no objection to the jurisdictional basis alleged by Petitioner in his Application for Writ of Certiorari, pages 3-4.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions and the statutes involved are fully set forth in Petitioner's Application for Writ of Certiorari, page 5.

QUESTION PRESENTED

Whether there was substantial evidence in the administrative record to support the decision of the La Vega Independent School District to demote Petitioner.

STATEMENT OF THE CASE

The statement of the case set out in Petitioner's Application for Writ of Certiorari and in the brief of Respondents filed by Mr. Herring, is exhaustive and will not be repeated.

ARGUMENT

This Honorable Court should affirm the ruling of the United States Court of Appeals for the Fifth Circuit and deny Petitioner's Application for Writ of Certiorari.

This case was structured in the District Court to fall within the mandate of the Fifth Circuit in *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970). That case attempted to define the proper scope of review of academic employment controversies by a Federal District Court. In *Ferguson v. Thomas, supra*, the Fifth Circuit held, as it has consistently since, that where there is no question of a procedural deficiency and substantial evidence in the record supports the

personnel decision of the academic agency, the decision of that agency should be affirmed. This was the approach followed in the recent case of *Bowling v. Scott*, 587 F.2d 229 (5th Cir. 1979), cert. denied 100 S.Ct. 69 (1980), affirming the termination of a college professor in which the Court stated:

> "... our independent review of the record before the committee convinces us that the action taken was supported by substantial evidence."

While this Court has never explicitly endorsed the approach to academic employment cases adopted by the Fifth Circuit, that approach is consistent with rulings of this Court. This Court has held that, where an academic employee of the State has a property interest in his job, due process requires that before such an employee may be terminated or demoted, he must be granted a hearing in which he should be informed of the grounds for the action and afforded an opportunity to challenge their sufficiency. *Perry v. Sinderman*, 408 U.S. 593 (1972). It would appear to be a tremendous waste of energy for the State to provide a hearing if it could not then rely on substantial evidence in the record to make a decision to terminate or demote the employee. It would be duplicative of effort and an intrusion into academic affairs for a Federal District Court to then rehear that evidence in trial. Instead, the District Court, as it did in this case, should make an independent review of the record before the academic forum to determine if substantial evidence supports the decision to make the demotion and, upon finding that it does, affirm the decision. The approach followed by the District Court allows academic controversies to be resolved in a proper forum and avoids undue intrusion into the internal affairs of academic institutions by the Federal Courts.

Petitioner did not challenge in either Court below the procedures followed in the hearing afforded him by the Defendants. Rather, the case was submitted to the

District Court by both parties as a question of substantial evidence.

There was clearly substantial evidence in the record to support the decision of the La Vega Independent School District Board of Trustees to demote the Petitioner and to support the decision of the State Board of Education affirming the School District's decision. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to make a decision. *Consolidated Edison v. National Labor Relations Board*, 305 U.S. 197 (1938).

Mr. Robert Caster, Superintendent of La Vega Independent School District, was Petitioner's direct superior. He testified at the hearing before the La Vega Board of Trustees about several problems he had encountered in dealing with Petitioner, including the following:

(1) Petitioner had failed to attend extracurricular activities of the school district after being instructed to do so. (Board TR. p. 14).

(2) Petitioner failed to deliver teacher evaluation reports on a timely basis. (Board TR. pp. 15, 16).

(3) Petitioner would not cooperate with the Parent Teacher Organization's efforts to purchase playground equipment for Petitioner's school. (Board TR. pp. 16-20).

(4) Petitioner scheduled speech therapy classes at his school in such a way that it resulted in unusually high absentee rates from those classes. (Board TR. pp. 16-29).

(5) Petitioner failed to timely complete applications for Federal funds for his campus. (Board TR. pp. 29-33).

(6) Petitioner was slow in correcting overcrowding in remedial reading classes, which overcrowding violated Federal regulations and threatened the loss of Federal funds. (Board TR. pp. 33-37).

(7) Petitioner failed to attend professional workshops and seminars. (Board TR. pp. 38-40).

The testimony of Mr. Caster regarding the Petitioner's professional inadequacies clearly constitutes substantial evidence supporting the La Vega Board of Trustee's decision to demote him. That has been the opinion of the Commissioner of Education of the State of Texas, the State Board of Education, the United States District Court and the United States Court of Appeals for the Fifth Circuit. Since there was substantial evidence supporting the school district's decision, the Court of Appeals correctly affirmed the summary judgment in favor of Respondents granted by the District Court.

CONCLUSION

The Application for Writ of Certiorari of Petitioner, Robert O. Polley, should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, do hereby certify that three copies of the foregoing Brief for the Respondents, M.L. Brockette and the State Board of Education of the State of Texas, in Opposition to the Application for Writ of Certiorari of Petitioner, Robert O. Polley, were mailed, postage prepaid, to TONY E. DUTY, Attorney at Law, 2309 Austin Avenue, Waco, Texas 76701, attorney for the Petitioner on this the _____ day of April, 1980. I further certify that all parties required to be served have been served.

LONNY F. ZWIENER